

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY- CAMDEN VICINAGE

CITY SELECT AUTO SALES, INC., a new Jersey corporation, individually and as the representative of a class of similarly situated persons,

Plaintiff,

v.

BMW BANK OF NORTH AMERICA, INC.,
BMW FINANCIAL SERVICES NA, LLC,
CREDITSMARTS CORP., and JOHN
DOES 1-12,

Defendants.

Case No. 13-cv-04595-NLH-JS

Assigned to the Hon. Noel L.
Hillman

Referred to Magistrate Judge Joel
Schneider

**LIMITED OPPOSITION (AS
TO CLAIM FORM ONLY) OF
DEFENDANTS BMW BANK
OF NORTH AMERICA AND
BMW FINANCIAL SERVICES
NA, LLC, TO MOTION FOR
PRELIMINARY APPROVAL
OF CLASS ACTION
SETTLEMENT AND NOTICE
TO THE CLASS**

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I. INTRODUCTION

Pending before this Court is the Motion for Preliminary Approval of Class Action Settlement and Notice to the Class (the “Motion”) (Dkt. No. 160), pursuant to which City Select Auto Sales, Inc. (“Plaintiff”) seeks preliminary approval of the Settlement Agreement and Release (the “Settlement Agreement”) entered into between Plaintiff and defendants BMW Bank of North America and BMW Financial Services NA, LLC (together, the “BMW Defendants”). The BMW Defendants do not oppose the Motion except as to one issue – whether to require IRS Form W-9 information from claiming Settlement Class Members.¹ Pursuant to Section III(B)(1) of the Settlement Agreement, the parties agreed to present their positions on this disputed issue to the Court and respectfully request that the Court provide a ruling as to whether the claim form, which must be submitted by Settlement Class Members to receive Settlement Award, should require the submission of W-9 information (in the form attached as Exhibit A to the accompanying Certification of Raymond A. Garcia, Esq. (the “Garcia Certification”), rather than the form proposed by Plaintiff).²

¹ Terms are used herein as defined in the Settlement Agreement (Dkt. No. 160-2).

² A copy of the IRS Form W-9 is available on the Internal Revenue Service website at: <https://www.irs.gov/pub/irs-pdf/fw9.pdf>. Importantly, the BMW Defendants do not seek to require the submission of a separate IRS Form W-9 in addition to the claim form, but rather ask that the Court approve the claim form

As set forth in the Motion, this action arises out of facsimiles received by Settlement Class Members that were caused to be transmitted by co-defendant Creditsmarts, Corp. (“Creditsmarts”). Under the Settlement Agreement, Settlement Class Members will receive \$145 per valid claim on a claims-made basis and subject to *pro rata* reduction as addressed in Section II(F)(2) of the Settlement Agreement. To address the requirements of Internal Revenue Code 26 U.S.C. § 3406, the BMW Defendants request that the Court approve the use of a claim form (Garcia Certification, Exhibit A) that includes a request for IRS Form W-9 information.

II. THE SETTLEMENT AGREEMENT

Pursuant to Section II(A)22 of the Settlement Agreement, the “Settlement Class” is defined as:

All persons in the United States that were sent a facsimile advertising the goods or services of up2drive, BMW Bank of North America, BMW Financial Services NA, LLC, or BMW of North America, LLC, transmitted by Creditsmarts on or after September 1, 2012, through January 1, 2013 (the “Class Period”).

The Settlement Class consists of 16,746 automotive dealerships that were contained in a database produced by Creditsmarts (the “Database”), that were added to the Database on or before the end of the Class Period, and that are

attached as Exhibit A to the Garcia Certification that incorporates requests for the W-9 information.

associated with a telephone or facsimile number in the Database (the “Class List”). Settlement Class Members that submit a valid and timely claim form will receive \$145 per facsimile number on the Class List (the “Settlement Award”), subject to a *pro rata* reduction if the cumulative value of claims would otherwise cause total payments related to the Settlement to exceed the Settlement Amount set forth in Section II(F)(2) of the Settlement Agreement.

III. THE BMW DEFENDANTS’ POSITION ON THE REQUIREMENT OF A CLAIM FORM SEEKING IRS FORM W-9 INFORMATION

Pursuant to Internal Revenue Code 26 U.S.C. § 3406, payors of a “reportable payment” must withhold a percentage of that payment when the payee “fails to furnish his [Taxpayer Identification Number] to the payor[;],” i.e., a Social Security Number for individuals or an Employee Identification Number for businesses. This is precisely the information sought by a IRS Form W-9.³ To address the requirements of Section 3406, the BMW Defendants request that this Court approve the use of the claim form attached as Exhibit A to the Garcia Certification, requiring that claiming Settlement Class Members provide IRS Form W-9 information.

Plaintiff opposes the use of a claim form that seeks IRS Form W-9 information, arguing that it is unnecessary here given the \$145 value of the

³ Notably, IRS Form W-9 information also is pertinent to reporting withheld payments to the IRS.

Settlement Awards. Specifically, Plaintiff's contention is based on the term "reportable payment," which is a defined term that includes, among other things, "any payment . . . required to be shown on a return required under [S]ection 6041[.]" 26 U.S.C. § 3406(b)(3)(A). Section 6041, in turn, addresses "[p]ayments of \$600 or more." 26 U.S.C. § 6041(a). Plaintiff argues that because the payments to Settlement Class Members are only \$145 and therefore fall below the \$600 threshold, IRS Form W-9 information is unnecessary.

Plaintiff's analysis is incomplete given the population of Settlement Class members in this case. Although Section 3406 applies to, among other things, payments of \$600 or more, this dollar threshold is considered in the aggregate. In other words, Section 3406 does not apply to single payments of \$600 or more, but also where the aggregate payments made to an individual or entity over the course of a year meet or exceed that threshold. Critically here, and unlike most class settlements, the Settlement Class is comprised of automotive dealerships that may have received additional, unrelated (but nonetheless within the Section 3406 calculation) payments from the BMW Defendants over the course of the year that could, in the aggregate, meet or exceed the \$600 threshold. Indeed, the BMW Defendants are part of a single tax entity that includes over 25 other divisions, increasing the possibility of other payments having been made to members of the Settlement Class in the regular course of business.

IRS Form W-9 information is pertinent to addressing other potential withholding obligations as well. As an initial matter, the “Exemption” fields identify payees that are exempt from backup withholding on a variety of potential bases. Additionally, IRS Form W-9 information is pertinent to addressing the requirements of 26 U.S.C. §§ 1441 and 1442, which require the withholding of tax on payments to nonresident aliens and foreign corporations, regardless of the amount of the payment. The information obtained will confirm the residency/domesticity of Settlement Class Members and that the obligation to withhold is not present here. Accordingly, and in an abundance of caution, the BMW Defendants request that the claim form to be used here seek IRS Form W-9 information, as set forth in Garcia Certification, Exhibit A.

Plaintiff argues that requiring IRS Form W-9 information may discourage the submission of claims. However, Plaintiff’s concern is unfounded. First, the provision of IRS Form W-9 information requires only a modicum of additional effort in connection with completing the claim form. For the convenience of the Settlement Class, the BMW Defendants have incorporated the IRS Form W-9 fields directly into the claim form itself, eliminating any need for Settlement Class Members to execute and submit a separate and additional IRS Form W-9 document. The incorporation of these fields into the claim form merely requires Class Members to enter their Taxpayer Identification Number, check a single box,

and sign a certification statement. (See Ex. A at 1-2.) This momentary effort is hardly a burden sufficient to discourage any Settlement Class Member from submitting a claim. Second, as discussed, the Settlement Class consists of automotive dealerships, not individuals. These businesses would regularly use their Employer Identification Number as a matter of course and are unlikely to hesitate to do so here in order to receive a Settlement Award (as opposed to an individual, who may be more reluctant to provide their Social Security number). Finally, the Settlement Award is not a *de minimis* payment but, instead, is up to \$145 per facsimile number on the Class List. This award is more than enough to incentivize Settlement Class Members to provide the limited information requested here.

IV. CONCLUSION

For the foregoing reasons, the BMW Defendants respectfully request that the Court approve the use of a claim form requesting IRS Form W-9 information in the form attached as Exhibit A to the Garcia Certification.

Dated: March 4, 2019

Respectfully submitted,

By: /s/ Ryan L. DiClemente

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